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CONSERVATION AND NATURAL RESOURCES

Water Resources: Extend Maximum Duration of Water Use Permits; Provide for Water Development and Conservation Plans; Preserve Department of Natural Resources' Right to Appeal Decisions of Administrative Law Judges

CODE SECTIONS: O.G.C.A § 12-1-2 (new), 12-5-31, -96 to -97 (amended)
 BILL NUMBER: SB 202
 ACT NUMBER: 348
 GEORGIA LAWS: 1995 Ga. Laws 706
 SUMMARY: The Act extends the maximum duration of permits for withdrawal, diversion, or impoundment of surface waters and ground waters to fifty years. Permits for more than twenty-five years must be based on a water conservation and development plan. The Act also provides for administrative review of decisions under this title.
 EFFECTIVE DATE: April 18, 1995¹

History

In 1989, the Georgia General Assembly passed a comprehensive natural resources planning law, the Georgia Planning Act (Planning Act).² The Planning Act called for local and regional planning, including planning for water supply watersheds, ground water recharge areas, wetlands, and river corridors.³ In 1992, the General Assembly enacted legislation

1. The Act became effective upon approval by the Governor.

2. 1989 Ga. Laws 1317 (codified at O.C.G.A. §§ 45-12-200 to -207 (1990 & Supp. 1995)); James L. Youngquist, *Growth Strategies: The Georgia State Planning Act—An Assessment of the Program*, PROC. OF THE 1995 GA. WATER RESOURCES CONF. 241, 241 (1995) (referring to the Act as “the best of all comprehensive statewide planning efforts in the United States because of its grassroots structure”).

3. James Frederick, *State of Georgia Environmental Planning Criteria Database*, PROC. OF THE 1995 GA. WATER RESOURCES CONF. 250 (1995). Environmental planning is just one aspect of the Georgia Planning Act of 1989. The minimum planning standards established by the Georgia

providing for the development of river basin management plans.⁴ Despite these two existing planning initiatives, the General Assembly introduced SB 202 in recognition of a need for additional water resource planning.⁵

With the growth in Georgia's population,⁶ water resources have become more and more in demand.⁷ In addition, Georgia's withdrawals from its water resources may be limited by considerations of the potential effects on downstream states⁸ and

Department of Community Affairs pursuant to 1989 Ga. Laws 1317 (codified at O.C.G.A. § 50-8-7.1(b)(1) (1994)) identified six key planning elements: population, economic development, natural and historic resources, community facilities, housing, and land use. Ga. Dep't of Community Affairs, *Minimum Planning Standards and Procedures* (undated) (available in Georgia State University College of Law Library).

4. 1992 Ga. Laws 1896 (codified at O.C.G.A. §§ 12-5-520 to -525 (1992)). For a discussion of Georgia's approach to river basin management planning, see W.M. Winn, III et al., *Georgia's Watershed Protection Approach: River Basin Management Planning*, PROC. OF THE 1995 GA. WATER RESOURCES CONF. 71 (1995).

5. See GEORGIA SENATE WEEKLY WRAP-UP REPORT, at 4 (Feb. 17, 1996).

6. N.D. "Skeeter" McClure, IV, *Resolution of Interstate Water Issues*, PROC. OF THE 1995 GA. WATER RESOURCES CONF. 28, 28 (1995). In the Atlanta metropolitan area alone, the overall population has increased by almost 700,000 from 1980 to 1990, to a total of about 2.8 million. *Id.* The population of the Apalachicola-Chattahoochee-Flint River Basin is expected to increase by 36% between 1990 and 2025. Millard W. Hall & Ty Harris, *The Apalachicola-Chattahoochee-Flint River Basin: A Model for Sustainability?*, PROC. OF THE 1995 GA. WATER RESOURCES CONF. 61, 62 (1995).

7. Ken Hall et al., *Developing the West Georgia Regional Water Supply Plan*, PROC. OF THE 1995 GA. WATER RESOURCES CONF. 283, 283 (1995). Over the next sixty years, demand for water in the five-county area northwest of Atlanta is projected to increase from 32 million gallons per day (mgd) to 157 mgd. *Id.* An estimated 441 mgd were withdrawn for irrigation in Georgia in 1990, more than half from ground water, representing 26% of all ground water used in Georgia. Julia L. Fanning, *Benchmark Farms for Estimating Irrigation Water Use in Georgia*, PROC. OF THE 1995 GA. WATER RESOURCES CONF. 274, 274 (1995). Ground water resources are also suffering from high demand. Telephone Interview with Neill Herring, Lobbyist, Sierra Club (Apr. 13, 1995) [hereinafter Herring Interview]. The Floridian aquifer, which provides water to Chatham County on the Georgia coast, is not recharging as fast as its water is being used. *Id.* Users fear that a salt water intrusion will occur shortly and their water source will be unusable without expensive purification. *Id.*

8. See Robert E. Vest, Note, *Water Wars in the Southeast: Alabama, Florida, and Georgia Square Off Over the Apalachicola-Chattahoochee-Flint*

states that share the same ground water sources.⁹ Such concerns prompted a first step toward mandatory water resource planning by the 1994 Georgia General Assembly¹⁰—the enactment of Code sections 12-5-31(d) and -96(a)(2).¹¹ The law required that any ground water or surface water users wanting to increase their water usage must provide a conservation plan with their permit applications.¹² Although this law concerns water conservation planning in limited circumstances, it does not specifically foster regional planning and does not compel water development planning.¹³

In response to the ever-increasing pressure on Georgia's finite water resources, the General Assembly enacted SB 202, a significant addition to Georgia's ongoing efforts in natural resource planning.¹⁴

SB 202

Water Permits

The Act amends the Georgia Water Quality Control Act,¹⁵ as it applies to surface water permits, and the Ground-Water Use

River Basin, 9 GA. ST. U. L. REV. 689, 692 (1993).

9. Herring Interview, *supra* note 7.

10. Telephone Interview with Mark Woodall, Lobbyist, Sierra Club (Apr. 27, 1995) [hereinafter Woodall Interview].

11. *See* 1994 Ga. Laws 863 (codified at O.C.G.A. § 12-5-96(a)(2) (Supp. 1995)); 1994 Ga. Laws 863 (codified at O.C.G.A. § 12-5-31(d) (Supp. 1995)).

12. 1994 Ga. Laws 863, § 3 (codified at O.C.G.A. § 12-5-96(a)(2) (Supp. 1995)); 1994 Ga. Laws 863, § 2 (codified at O.C.G.A. § 12-5-31(d) (Supp. 1995)).

13. *See* 1994 Ga. Laws 863 (codified at O.C.G.A. § 12-5-96(a)(2) (Supp. 1995)); 1994 Ga. Laws 863 (codified at O.C.G.A. § 12-5-31(d) (Supp. 1995)).

14. Telephone Interview with Sen. Arthur B. "Skin" Edge, Senate District No. 28 (Apr. 13, 1995) [hereinafter Edge Interview]. However, David Word contends that conservation planning was already required under the Environmental Protection Division's (EPD) rules for all new permits and all permits for increased usage, and that the Act changes little with regard to regional planning since regional planning is already being performed pursuant to the Georgia Planning Act of 1989. Telephone Interview with David Word, EPD Assistant Director of Programs (Apr. 28, 1995) [hereinafter Word Interview]. The only significant change that the Act makes, according to Word, is the extension of permits to fifty years. *Id.*

15. 1964 Ga. Laws 416 (codified at O.C.G.A. 12-5-20 (1992)).

Act of 1972,¹⁶ as it applies to ground water permits.¹⁷ Prior to the Act, water users were able to obtain withdrawal, diversion, and impoundment permits¹⁸ from the Department of Natural Resources (DNR) for only a ten-year period for ground water¹⁹ and a twenty-year period for surface waters.²⁰ These restrictions discouraged long-range planning; decisions were made only after reviewing the respective ten- or twenty-year consequences.²¹ The Act extends the duration of permits for both surface and ground waters to a maximum of fifty years.²²

The law further promotes water development and conservation planning by predating the issuance of any permit in excess of twenty-five years on the adequacy of the water supply projected over the duration of the permit and on conformance with a water development and conservation plan.²³ The water development and conservation plan will be developed by the applicant or will conform to a regional plan, if the DNR deems a regional plan necessary.²⁴

While water conservation and development plans are not required for permits for less than twenty-five years, the

16. 1972 Ga. Laws 976 (codified at O.C.G.A. § 12-5-90 (1992)).

17. O.C.G.A. §§ 12-5-31(h), -97(a) (Supp. 1995).

18. 1977 Ga. Laws 368 (codified at O.C.G.A. § 12-5-31(a)(1)(A)-(D) (Supp. 1995)). No permit is necessary for withdrawals, diversions, or impoundments of less than 100,000 gallons per day on a monthly average. *Id.*

19. 1988 Ga. Laws 1694 (formerly found at O.C.G.A. § 12-5-97 (1992)).

20. 1988 Ga. Laws 1694 (formerly found at O.C.G.A. § 12-5-31(h) (Supp. 1994)). The duration of the permit was premised "on any reasonable system of classification based upon but not necessarily limited to such factors as source of supply and type of use." *Id.* The DNR had discretionary power to approve fifty-year permits to municipalities "to provide for the retirement of bonds for the construction of water works or waste disposal facilities." *Id.*

21. Telephone Interview with Harold Reheis, Director, Department of Natural Resources (Apr. 11, 1995) [hereinafter Reheis Interview]. Those concerned about the duration of the permits argue that the fifty-year term length limits flexibility in responding to changing water resource availability and usage. Woodall Interview, *supra* note 10; Telephone Interview with Becky Shortland, Vice President, Georgia Conservancy (Apr. 28, 1995) [hereinafter Shortland Interview].

22. O.C.G.A. §§ 12-5-31(h), -97(a) (Supp. 1995).

23. *Id.* For a suggested methodology for ground water resource planning, see Lisa J. Hollingsworth, *Groundwater Resource Management Planning for North Georgia*, PROC. OF THE 1995 GA. WATER RESOURCES CONF. 285 (1995).

24. O.C.G.A. §§ 12-5-31(h), -96(e) (Supp. 1995).

Environmental Protection Division (EPD) of the DNR retains some discretion in issuing such permits.²⁵ The EPD may set the duration of such permits based on consideration of “such factors as source of supply and type of use.”²⁶

The Act also establishes planning criteria. Each water development and conservation plan must: (1) “promote the conservation and reuse of water within the state”;²⁷ (2) “guard against a shortage of water within the state”;²⁸ (3) “promote the efficient use of the water resource”;²⁹ and (4) “be consistent with the public welfare of the state.”³⁰ If the EPD requires a regional plan, either the EPD or its designee may develop such a plan to meet these criteria.³¹ Permit review is to be performed “periodically or upon a substantial reduction in average annual volume of the water resource which adversely affects water supplies.”³²

Legislative Evolution

SB 202, as introduced, was recommended by Harold Reheis, Director of the Department of Natural Resources.³³ Through a joint drafting effort by the Sierra Club and Union Camp,³⁴ a substitute bill was passed which contained more environmental safeguards than the original bill.³⁵ The Act embodies a

25. *See id.* §§ 12-5-31(h), -97(a).

26. *Id.*

27. *Id.* § 12-5-31(h).

28. *Id.*

29. *Id.*

30. *Id.* The requirements are the same whether the plan is an applicant plan or regional plan. *Id.* § 12-5-96(e).

31. *Id.*

32. *Id.* §§ 12-5-31(h), -97(a).

33. Reheis Interview. *supra* note 21.

34. SIERRA CLUB, GEORGIA LEGISLATIVE REPORT (Mar. 23, 1995) [hereinafter SIERRA CLUB REPORT] (available in Georgia State University College of Law Library). The collaboration between Union Camp, a major pulp and paper firm, and the Sierra Club, an environmental interest group, represented “a significant step toward cooperation between traditional antagonists.” *Id.* Ogden Doremus, an environmental attorney, volunteer Sierra Club lobbyist, and state court judge, also made a major contribution to the substitute bill drafting effort. Telephone Interview with Mike Vaquer, Mgr. of Gov’t Affairs, Union Camp Corp. (Apr. 13, 1995) [hereinafter Vaquer Interview].

35. *Compare* SB 202, as introduced, 1995 Ga. Gen. Assem. *with* SB 202

compromise between the DNR,³⁶ municipal users, and a majority of industrial users on one side and environmental interests and Union Camp on the other.³⁷

The changes between SB 202, as introduced and approved in the Senate Natural Resources Committee, and the House Natural Resources Committee substitute, which ultimately passed easily,³⁸ include the following: (1) planning requirements for permits of twenty-five years or more rather than fifty years; (2) a specification of the elements of a water and conservation plan; (3) identification of the parties responsible for developing such plan; (4) provisions for considering water supply in the planning and permitting processes; and (5) the interval for interim review of the permit.³⁹

(HCSFA), 1995 Ga. Gen. Assem.

36. Rebecca Adams, *Senate OKs Water Bill: Changes Sought in House Version*, MACON TEL., Feb. 14, 1995, at 1B. The EPD, however, was not totally opposed to the planning measures. "If they're interested in seeing language to recycle and reuse water and promote conservation, we're all for it." *Id.* (quoting David Word).

37. SIERRA CLUB REPORT, *supra* note 34 (The substitute drafted by Sierra Club and Union Camp "was opposed by the EPD, which sought to grant unconditional 50-year permits in the measure as proposed"). Because it depends on the groundwater from the Floridian aquifer, Union Camp's interests are different than that of the majority of the industrial users in the state. Brad Swope, *State Tightening Water Permits: Regional Aquifer Strategy Awaited*, SAVANNAH NEWS-PRESS, Nov. 7, 1994, at 1C. The Floridian aquifer is a water-bearing limestone formation that also provides Savannah and other coastal Georgia and South Carolina communities with most of their drinking water. *Id.* In November 1994, Union Camp's water permit was extended by only seven months rather than by an additional ten-year term. *Id.* There is some public sentiment that the municipal and residential water requirements should be prioritized over the industrial water usage. *Id.* Pursuant to O.C.G.A. §§ 12-5-31(h), -97(a) (Supp. 1995), municipalities could be granted fifty-year permits that could result in limiting Union Camp's usage of the aquifer, particularly since salt water intrusion into the aquifer is already occurring in Brunswick, Georgia and Hilton Head, South Carolina. *Id.* at 1C, 3C. According to a Union Camp spokesperson, "Union Camp officials are concerned that any well-water rights they give up would go to subsidize private development via residential wells." *Id.* at 3C.

38. The bill passed 53-0 in the Senate. Senate Roll Call, Feb. 13, 1995. The House substitute passed 101-3. House Journal, Mar. 15, 1995. The Senate agreed to the House substitute, 31-1. Senate Roll Call, Mar. 17, 1995.

39. Compare SB 202, as introduced, 1995 Ga. Gen. Assem. with 1995 Ga.

As introduced, SB 202 required a water development and conservation plan only for fifty-year permits and did not detail the elements of the plan.⁴⁰ The House substitute decreased the permit duration triggering mandatory planning from fifty years to twenty-five years and included the four planning criteria listed above.⁴¹

The bill, as introduced, did not delineate the contents of a regional water conservation and development plan.⁴² In accordance with the Sierra Club and Union Camp suggestions,⁴³ the Act requires that such plan include “water development, conservation, and sustainable use and shall be based upon detailed scientific analysis of the water source, the projected future condition of the resource, current demand, and estimated future demands on the resource.”⁴⁴

The entities responsible for developing water conservation and development plans were not identified in SB 202, as introduced.⁴⁵ The environmental community and Union Camp preferred that this responsibility rest with the EPD and that the development of the plans be mandatory.⁴⁶ The EPD argued that it should be able to delegate this responsibility, even to the applicant, to encourage participation of the local communities in

Laws 706. Each of the changes that occurred during the legislative process significantly increased the environmental sensitivity of the law. Telephone Interview with George W. Sherk, Visiting Professor, Georgia State University College of Law (Apr. 27, 1995).

40. SB 202, as introduced, 1995 Ga. Gen. Assem.

41. SB 202 (HCSFA), 1995 Ga. Gen. Assem.

42. SB 202, as introduced, 1995 Ga. Gen. Assem.

43. Sierra Club Report, *supra* note 34; Vaquer Interview, *supra* note 34; Woodall Interview, *supra* note 10; Herring Interview, *supra* note 7.

44. O.C.G.A. § 12-5-31(h) (Supp. 1995). A discussion version of the bill provided for a “detailed scientific analysis of the hydrogeologic and geohydrologic condition of the aquifer” instead of just the broad requirement that a “detailed scientific analysis” be performed. SB 202, discussion draft, Feb. 13, 1995 (available in Georgia State University College of Law Library). The term, “sustainable development,” was defined in the 1987 report of the World Commission on Environment and Development as “‘development that meets the needs of the present without compromising the ability of future generations to meet their own needs.’” Donald A. Wilhite, *Sustainable Development: A Challenge for the 21st Century*, PROC. OF THE 1995 GA. WATER RESOURCES CONF. 57, 57 (1995) (quoting Brundtland Commission Report).

45. See SB 202, as introduced, 1995 Ga. Gen. Assem.

46. Vaquer Interview, *supra* note 34; Herring Interview, *supra* note 7.

the planning process.⁴⁷ The EPD succeeded on both issues: the Act not only gives the EPD discretion in whether to develop a regional plan, but it also gives the DNR the authority to delegate plan development to designees.⁴⁸

No provisions were included in the bill, as introduced, for the consideration of present or future water supplies in granting a permit.⁴⁹ However, the Act takes into consideration the availability of water supplies.⁵⁰ First, for permits for twenty-five years or more, the Act requires that the DNR "evaluate the condition of the water supply to assure that the supply is adequate to meet the multiple needs of the citizens of the state as can reasonably be projected for the term of the permit."⁵¹ Secondly, the Act provides for the review of any existing permits to evaluate whether the plan "continues to meet the overall supply requirements for the term of the permit."⁵² Finally, the Act includes future water supply considerations in the regional water conservation and development plan.⁵³

47. Vaquer Interview, *supra* note 34; Herring Interview, *supra* note 7.

48. O.C.G.A. § 12-5-31(h) (Supp. 1995). "In the event the director determines that a regional plan is required in connection with any application for a permit for the use of water for a period of 25 years or more, the division or a person or entity designated by the division may develop such a plan." *Id.* (emphasis added). "The division or a party designated by the division may develop a regional water development and conservation plan for the state's major aquifers or any portion thereof." *Id.* § 12-5-96(e) (emphasis added).

49. See SB 202, as introduced, 1995 Ga. Gen. Assem. "The department's bill pretends that the permit, a piece of paper, is equal to water. . . . If a stream runs dry, that piece of paper won't mean anything." Adams, *supra* note 36 (quoting Neill Herring, spokesman for the Sierra Club).

50. O.C.G.A. §§ 12-5-31(h), -97(a) (Supp. 1995). A provision discussed, but not included in the House floor substitute, would have required that groundwater use be limited "if the aquifer is judged, by scientific evaluation, as to be in a condition of historic deficit for recharge, . . . and to assure the fact that aquifer recharge is equivalent to the rate of withdrawal, and that recovery of aquifer levels is proceeding to achieve historic levels." SB 202, discussion draft, Feb. 3, 1995 (available in Georgia State University College of Law Library).

51. O.C.G.A. §§ 12-5-31(h), -97(a) (Supp. 1995).

52. *Id.* § 12-5-31(h). This language was omitted for groundwater permits. See *id.* § 12-5-97(a).

53. *Id.* § 12-5-96(e).

SB 202, as introduced, provided for periodic review to verify the permittee's compliance with the permit.⁵⁴ Early drafts proposed that such a review be performed every five years.⁵⁵ Later drafts doubled this to a ten-year period.⁵⁶ The Act does not dictate an exact number of years for review, but calls for review "periodically or upon a substantial reduction in average annual volume of the water resource which adversely affects water supplies."⁵⁷

The Board of Natural Resources is charged with promulgating regulations to implement the Act.⁵⁸ During the rule-making process, the public will be involved in the resolution of a number of critical issues not addressed by the Act.⁵⁹ One such issue is the delineation of regions for the purpose of water development and conservation planning.⁶⁰ The regions may coincide with the existing Regional Development Centers,⁶¹ the regions under the Governor's Economic Development program,⁶² or along the lines drawn in planning activities that commenced prior to the passage of the Act.⁶³ However, the benefits of using an existing management structure must be weighed against the planning

54. SB 202, as introduced, 1995 Ga. Gen. Assem.

55. SB 202, discussion draft, Feb. 3, 1995 (available in Georgia State University College of Law Library).

56. SB 202, discussion draft, Feb. 9, 1995; SB 202, discussion draft, Feb. 13, 1995; SB 202, discussion draft A, Feb. 13, 1995; SB 202, discussion draft B, Feb. 17, 1995; SB 202, discussion draft C, Feb. 21, 1995; SB 202, discussion draft C2, Feb. 21, 1995 (all available in Georgia State University College of Law Library).

57. O.C.G.A. § 12-5-31(h) (Supp. 1995).

58. *Id.* §§ 12-5-31(h), -97(a).

59. Telephone Interview with Napoleon Caldwell, Program Mgr., Water Resources Mgmt., EPD (Apr. 25, 1995) [hereinafter Caldwell Interview].

60. According to EPD officials, Union Camp lobbyists, and Sierra Club lobbyists, there was little consideration given during the legislative process to a method for delineating these regions. Word Interview, *supra* note 14; Caldwell Interview, *supra* note 59; Woodall Interview, *supra* note 10; Vaquer Interview, *supra* note 34.

61. Youngquist, *supra* note 2, at 244.

62. Youngquist, *supra* note 2, at 244.

63. Caldwell Interview, *supra* note 59. An example of a planning activity that proceeded the Act is ground water planning for Cobb County. See James M. Emery et al., *Groundwater Exploration and Development: A Case Study for Cobb County-Marietta Water Authority*, PROC. OF THE 1995 GA. WATER RESOURCES CONF. 405 (1995).

effectiveness that could be achieved by basing the regions on watershed delineations.⁶⁴

Objectives

Two primary objectives in increasing the maximum permit duration are to lessen the administrative duties of the DNR⁶⁵ and to encourage water users to engage in water development and conservation planning.⁶⁶

Industrial users and local government entities prefer permits with longer durations for amortization of their capital expenditures.⁶⁷ However, in exchange for the greater predictability afforded them by the longer permits, the industrial users and local government entities bear a higher level of responsibility for water conservation and development than they had shouldered for shorter term permits.⁶⁸

The EPD plans to involve local governments and other users in the planning process, either by delegating the responsibility of planning or by working closely with these entities.⁶⁹ Industrial and municipal users who seek permits in excess of twenty-five years may find themselves compelled by the limitations of the

64. Caldwell Interview, *supra* note 59.

65. Adams, *supra* note 36 ("The bill is just a matter of efficiency and less bureaucracy," said David Word, assistant director of the Environmental Protection Division, who had a hand in crafting the legislation."). This has become administratively cumbersome, particularly since 1991, when farm users were also required to obtain permits under 1988 Ga. Laws 1694 (codified at O.C.G.A. § 12-5-31(a)(3) (Supp. 1995)). Caldwell Interview, *supra* note 59.

66. Reheis Interview, *supra* note 21.

67. Memorandum from Charles T. DuMars, Counsel to Comprehensive Study Committee, to Georgia State University Law Review, Apr. 13, 1995 [hereinafter DuMars Memo] (available in Georgia State College of Law library). When investing in water treatment facilities, local governments often seek fifty-year bonds. Vaquer Interview, *supra* note 34. If the bond period were to exceed the length of the permit, the bond might not be paid back prior to the expiration of the permit. Vaquer Interview, *supra* note 34. With such uncertainty, it would be difficult for a local government entity to obtain capital for its water projects. Vaquer Interview, *supra* note 34. While the prior law granted the DNR discretion to allow permits for fifty years, local governments were in favor of the greater statutory certainty afforded by the Act. Vaquer Interview, *supra* note 34.

68. Reheis Interview, *supra* note 21.

69. Caldwell Interview, *supra* note 59.

EPD's resources to contribute substantially to the water development and conservation planning process.⁷⁰

While serving these administrative and planning purposes, the Act may also have strong implications with respect to interstate water resources.⁷¹ Tensions have arisen between states because of a growing awareness of limited water supplies in interstate waters, resulting in "efforts by affected states to protect their access to these vital resources . . . for *their* citizens."⁷² Georgia, at present, is attempting to resolve differences with Alabama and Florida concerning the management of the Alabama-Coosa-Tallapoosa and Apalachicola-Chattahoochee-Flint river basins—primarily a surface water problem.⁷³ At the same time, it appears that objections from South Carolina about Georgia's use of the Floridian aquifer⁷⁴ are on the horizon—a ground water

70. Caldwell Interview, *supra* note 59. Some commentators view such community involvement within the region as essential to achieving a plan that serves the public welfare. Charles T. DuMars & Michele Minnis, *New Mexico Water Law: Determining Public Welfare Values in Water Rights Allocation*, 31 ARIZ. L. REV. 817, 817 (1989) ("[P]ublic welfare interests can be determined best at the local level through a regional water planning process.").

71. Harold Reheis, attributed with the original conception of SB 202, maintains that strengthening Georgia's legal position with respect to its downstream neighbors was not one of the objectives of the Act. Reheis Interview, *supra* note 21. Charles DuMars, Counsel to the Comprehensive Study Committee, found only an indirect relationship: "The amendments are only indirectly related to the disputes over the interstate rivers." DuMars Memo, *supra* note 67. In contrast, environmental lobbyists contend that interstate water conflicts were the primary consideration driving the legislation. Woodall Interview, *supra* note 10; Herring Interview, *supra* note 7; Shortland Interview, *supra* note 21.

72. Ronald G. Cummings, *Economic and Planning Issues Relevant for the Management of Interstate Water Resources*, PROC. OF THE 1995 GA. WATER RESOURCES CONF. 21, 21 (1995).

73. McClure, *supra* note 6, at 29. The three states, along with the Army Corps of Engineers, are participating in a comprehensive water resources study being conducted under a Memorandum of Agreement (MOA). McClure, *supra* note 6, at 29. The study is expected to be completed in September 1995. McClure, *supra* note 6, at 29.

74. Swope, *supra* note 37.

The [Floridian] aquifer supplies most of the drinking water in Savannah and nearby coastal Georgia and South Carolina communities.

But decades of heavy residential and industrial well-water use, now amounting to tens of millions of gallons a day, has created a suction that scientists say is drawing salt water inland under the ocean floor.

problem.⁷⁵ The Act may help to preserve Georgia's rights to certain waters within the state.⁷⁶

Since 1945,⁷⁷ the United States Supreme Court has consistently applied the doctrine of equitable apportionment⁷⁸ to interstate water disputes.⁷⁹ In determining the equitable apportionment of interstate waters, one of the factors the Court has considered is "the practical effect of wasteful uses on downstream areas."⁸⁰ The Court has further instructed that states have "an affirmative duty to take reasonable steps to conserve and augment the water supply of an interstate stream."⁸¹ It is likely that the Court, in deciding an interstate water dispute, will consider the "extent to which the respective

. . . .

Reducing or at least preventing increases in aquifer use . . . may be the only way to head off the contamination danger to Savannah's wells, officials and scientists have warned since the mid-1980s.

Swope, *supra* note 37.

75. George W. Sherk, *Resolving Interstate Water Conflicts in the Eastern United States: The Re-Emergence of the Federal-Interstate Compact*, 30 WATER RESOURCES BULL. 397, 406 (1994) [hereinafter Sherk, *Resolving Interstate Water Conflicts*] ("[C]ontamination of surface and ground water may reduce the supply of usable water available to South Carolina and Georgia. If (perhaps when) this occurs, Georgia may have to consider . . . legal remedies . . .").

76. See DuMars Memo, *supra* note 67.

77. *Nebraska v. Wyoming*, 325 U.S. 589 (1945). The doctrine of equitable apportionment was first applied by the Supreme Court in 1907 in *Kansas v. Colorado*, 206 U.S. 46 (1907), but the factors to be considered were not enunciated until *Nebraska v. Wyoming*. See George W. Sherk, *Equitable Apportionment After Vermejo: The Demise of a Doctrine*, 29 NAT. RESOURCES J. 565, 567, 570-71 (1989) [hereinafter Sherk, *Equitable Apportionment*].

78. See A. Dan Tarlock, *The Law of Equitable Apportionment Revisited, Updated, and Restated*, 56 U. COLO. L. REV. 381, 406 (1985). The Court's balancing of two states' interests without strictly following either the prior appropriations doctrine, which is based on principles of seniority of use, or the riparian doctrine, which requires sharing of the available water supplies by users adjoining or overlying the water resource, is termed "equitable apportionment." *Id.*

79. See generally Sherk, *Equitable Apportionment*, *supra* note 77.

80. *Nebraska*, 325 U.S. at 618; see also *Colorado v. New Mexico*, 459 U.S. 176 (1982).

81. *Colorado*, 459 U.S. at 185. "*Colorado v. New Mexico* is the first time that the Court imposed a duty to conserve on water users as a condition to a successful claim to a fair share of an interstate river." Tarlock, *supra* note 78, at 406.

states have conserved and augmented their water supplies.”⁸² If a state cannot produce evidence that it is active in conserving and augmenting its water supplies, its claim may fail.⁸³ “Such evidence typically relies upon the state’s comprehensive water plan and its legal and regulatory mandates for the conservation and reuse of water.”⁸⁴

Thus, through development of water conservation and development plans, Georgia will conform with the Supreme Court’s directive.⁸⁵ If an interstate water dispute is brought before the United States Supreme Court, Georgia will be in a superior position because it has taken these measures.⁸⁶

In equitable apportionment, the Court also considers “the extent of established [water] uses”⁸⁷ or “temporal priority.”⁸⁸ The fifty year permits may preclude other states from claiming rights to the water quantities allocated under the permits.⁸⁹ However, temporal priority is only one of the factors the Supreme Court considers; thus, “there is no guarantee that the Court will protect existing uses of water when it fashions its decree.”⁹⁰

Not only is water conservation and development planning critical to Georgia in seeking judicial resolution of an interstate water dispute, but such planning also strengthens Georgia’s negotiation stance should Georgia join an interstate compact.⁹¹ Before agreeing to any increased usage of an interstate water

82. Sherk, *Equitable Apportionment*, *supra* note 77, at 577.

83. *See, e.g., Colorado v. New Mexico*, 467 U.S. 310, 318 (1984); *New Jersey v. New York*, 283 U.S. 336, 346 (1931).

84. Cummings, *supra* note 72, at 21.

85. DuMars Memo, *supra* note 67.

86. DuMars Memo, *supra* note 67.

87. *Nebraska v. Wyoming*, 325 U.S. 589, 618 (1945).

88. The term “temporal priority” refers to the prior appropriation doctrine according to which the highest priority went to the most senior water use, or in other words “first-in-time is first-in-right.” George W. Sherk, *Meetings of Waters: The Conceptual Confluence of Water Law in the Eastern and Western States*, 5 NAT. RESOURCES & ENV’T 3, 5 (1991).

89. Sherk, *Equitable Apportionment*, *supra* note 77, at 579 n.69 (“It is difficult . . . to imagine a circumstance where a state could prove . . . that equity favored its proposed water use over another state’s existing water use.”).

90. Sherk, *Resolving Interstate Water Conflicts*, *supra* note 75, at 406.

91. Sherk, *Resolving Interstate Water Conflicts*, *supra* note 75, at 406 (advocating interstate compacts as preferable to judicial intervention in most cases).

resource, the other states to the compact would require Georgia to demonstrate a significant effort toward conservation and development planning.⁹² Implementation of the Act should help Georgia to meet such a burden.⁹³

Right to Appeal

The Act clarifies the method and right to appeal decisions made by administrative law judges (ALJs) following recent changes affecting the DNR.⁹⁴ This provision was attached just before SB 202 was passed.⁹⁵

Until 1994, the DNR appointed its own ALJs.⁹⁶ However, when the General Assembly established the Office of State Administrative Hearings,⁹⁷ it became unclear whether the DNR could appeal the decisions of its ALJs.⁹⁸ Thus, this provision was added to preserve the right of review for the DNR and the various entities within the DNR.⁹⁹ The Act also provides a procedure for requesting an administrative review by an ALJ of decisions made by the DNR or one of its entities.¹⁰⁰ The requests must be filed "with the decision maker or entity within the department whose decision is to be reviewed."¹⁰¹

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92. DuMars Memo, *supra* note 67.

93. DuMars Memo, *supra* note 67.

94. Reheis Interview, *supra* note 21.

95. Telephone Interview with David Baird, Legislative Tracker, DNR (Apr. 11, 1995). A similar bill was attached to Title 27. *Id.*

96. 1984 Ga. Laws 404 (codified at O.C.G.A. § 12-2-2(c)(2) (1992)).

97. 1994 Ga. Laws 1856 (codified as O.G.C.A § 50-13-41 (1994)).

98. Reheis Interview, *supra* note 21.

99. O.C.G.A. § 12-1-2 (Supp. 1995); Reheis Interview, *supra* note 21.

100. O.C.G.A. § 12-1-2(c) (Supp. 1995).

101. *Id.*